claim of more than $8.5 million. *See In re Sacred Heart Hosp. of Norristown*, 209 B.R. 650 (E.D. Pa. 1997); *In re Allegheny Health Education and Research Foundation*, Nos. 98-25773 – 98-25777 (Bk. W.D. Pa.). The experience of other States is similar. In the present case, New Jersey has a claim of $9.2 million. Massachusetts' reimbursement claim in *In re Boston Regional Medical Center, Inc. (Boston Regional I)*, 291 F.3d 111 (1st Cir. 2002), was $3 million. Michigan's claim in *In re Michigan Hospital and Medical Center*, No. 95-43297 (Bk. E.D. Mich.), was $1.1 million. Oregon's reimbursement claim in *In re Cottage Grove Hospital*, 265 B.R. 241 (Or. 2001), was more than $435 thousand and Ohio sought reimbursement for over $842 thousand in UC benefits it paid in *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603 (Ohio 1997).

The Third Circuit's decision lumps these claims together with those of all other unsecured creditors, which means that, as a practical matter, States will collect little or nothing on them. Worse, it creates a perverse incentive for non-profits approaching bankruptcy to default on UC obligations which they might otherwise have paid, knowing that once in bankruptcy they can avoid, or at least substantially lessen, their obligations. Under the Third Circuit's regime, then, the States' reimbursement claims against bankrupt non-profits are likely to grow simultaneously both larger and less collectible.

The States' options for dealing with this financial impact are quite limited. Requiring non-profit organizations to make regular quarterly contributions like other employers would imply dropping out of the national UC program created by Congress, an alternative which is neither practical nor desirable. For fiscal year 2003, the value of FUTA tax credits to

employers nationwide was $46.4 billion.[5] For fiscal year 2004, the States received about $2.3 billion[6] from the federal government for administration of their UC programs and another $750 million for employment services.[7] The States cannot realistically maintain the present level of UC benefits without the support provided to them under FUTA.

Nor can the UC program simply absorb the added costs imposed upon it by these uncollectible claims against non-profits. The States' UC funds are intended to be self-sufficient, with incoming contributions and reimbursements at the level necessary to meet benefit expenditures. The funds are kept separate from general revenues and are deposited in the national Unemployment Trust Fund. 26 U.S.C. §3304(a)(4). The States' UC funds are already facing significant shortfalls. The States have been forced to borrow large amounts of money from the federal government in order to meet rising benefit costs and falling tax revenues. At the end of the 2003 fiscal year, the States owed a total of $1,581,134,000 to the federal government as a result of their UC obligations.[8] If the States are not reimbursed for benefits paid to former employees of non-profit organizations, the financial burden facing the States will become more severe. States will then be forced to recapture lost revenue by either charging other employers higher rates or by reducing benefits to the unemployed.

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[5] FUTA Receipts versus Amounts Returned for Fiscal Year 2003 (DOLETA).

[6] Fiscal Year 2004 State UI Allocations (DOLETA).

[7] Employment Service (Wagner-Peyser) PY 2005 Preliminary vs. PY 2004 Final Allotments (DOLETA), Federal Register, Vol. 70, No. 57 at 15515.

[8] Unemployment Insurance Financial Data Handbook No. 394 (DOLETA).

The question presented by this case is thus neither isolated nor unimportant, but rather is one which confronts all fifty States and a major federal program which affects literally millions of employees and employers. It is an important question of federal law which the Court should address and resolve.

II. The Third Circuit's Decision Has Deepened The Confusion Among The Lower Courts On How To Apply The *Anderson-Feiring* Test And Undermined The National Uniformity Congress Intended In Enacting Both The Federal Unemployment Tax Act And The Bankruptcy Code.

Almost a century ago, the Court in *State of New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) held that a "tax" for the purposes of bankruptcy is a "pecuniary burden laid upon individuals or property for the purpose of supporting the government [which can be] enforced by action against the will of the taxpayer." In *City of New York v. Feiring*, 313 U.S. 283, 285 (1941), the Court reiterated this standard, stating that a tax "extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of the government or of undertakings authorized by it...." More recently, in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221-22 (1996), the Court again endorsed these principles and specifically noted that Congress did not reject them when it enacted the Bankruptcy Code in 1978.

Nevertheless, as this case illustrates, the courts of appeals are deeply divided on whether reimbursement payments made to the States for unemployment compensation, workers compensation and other government programs should be considered a tax for

purposes of Sections 507(a)(1) and 507(a)(8) of the Bankruptcy Code. Although this Court's previous decisions in *Anderson*, *Feiring*, and *Reorganized CF & I Fabricators* provide some guidance on this question, the lower courts are confused and divided on how to apply their principles to cases like this one.

On one hand, the Ninth Circuit uses a four-part test which that court derived from *Anderson* and *Feiring*, *See In re Lorber Indus. of Ca. Inc.*, 675 F.2d 1062 (9th Cir. 1982). The *Lorber* test asks whether an exaction is (a) an involuntary pecuniary burden; (b) legislatively imposed; (c) under the police or taxing power of the state; and (d) for public purposes, including the purposes of defraying expenses of government or undertaking authorized by the government. *See id.*, at 1066. If so, then the exaction is a tax.

The Second, Fourth, Eighth and Tenth Circuits have followed the Ninth Circuit, and in applying these factors have held that governmental exactions similar to the UC contributions at issue in this case are "taxes" within the meaning of the Bankruptcy Code. *See In re Chateaugay Corp. v. Shalala*, 53 F.3d 478, 498 (2nd Cir. 1995) (payments under the Coal Industry Retiree Health Benefit Act of 1992 are taxes); *Williams v. Motley*, 925 F.2d 741, 743-44 (4th Cir. 1991) (assessment for uninsured motor vehicle was a tax); *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 720 (4th Cir. 1989) (premiums owed to workers compensation fund were a tax); *In re Juvenile Shoe Cop. of America*, 99 F.3d 898, 901 (8th Cir. 1996) (assessment on money withdrawn from employee pension plan under 26 U.S.C. §4980 was a tax); *In re Camilli*, 94 F.3d 1330, 1333 (9th Cir. 1996) (reimbursement of workers' compensation benefits to the State was a tax), *cert. denied*, 519 U.S. 1113 (1997); *In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998) (payments under Coal Industry Retiree Health Benefit Act were a tax). *Cf. In re Lorber Indus. of*

Ca. Inc., supra (sewer fee not a tax under *Anderson-Feiring* because it was voluntarily assumed and in the nature of a contract).

On the other hand, the Third Circuit in this case, as well as the First Circuit, the Sixth Circuit and other lower courts have held that similar claims are not taxes, but are instead ordinary debts owed to the State. *See In re Boston Regional Medical Center, Inc.*, 291 F.3d 111 (1st Cir. 2001) ("*Boston Regional I*") (unemployment compensation reimbursement); *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*") (reimbursement of payments made under state workers compensation law were not "excise tax" for purposes of Bankruptcy Code); *In re Freymiller Trucking, Inc.*, 194 B.R. 914 (Bk. W.D. Okla. 1996) (reimbursements not a tax); *In re Payne*, 27 B.R. 809 (Bk. D. Kan. 1983) (same).

Even these courts have been divided in their reasoning, unable to agree on a single test which can be easily applied in this area. For example, the Sixth Circuit in *Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1993) ("*Suburban II*") (in the context of workers compensation), added to the *Anderson-Feiring* test the requirements that the exaction must be "universally applicable to similarly situated entities" and that "according priority treatment to the government claim [will] not disadvantage private creditors with like claims." *Suburban II*, 36 F.3d at 488. The First Circuit, in *Boston Regional I*, thought that the fact that Massachusetts could have required the debtor to post a bond was dispositive. In this case, the Third Circuit disagreed with the reasoning of the First Circuit, but nonetheless concluded that the reimbursement payments were not a tax. However, as Chief Judge Scirica's dissent demonstrates, the test used by the Third Circuit is confusing and difficult, if not impossible, to apply, and would lead to inconsistent and mixed results if other courts attempted to rely on

it. *United Healthcare*, 396 F.3d at 247 (Scirica, C.J., dissenting).

The division and confusion among the circuits which the Third Circuit's decision exemplifies defeats Congress' intent to create not only a uniform law for bankruptcy, *see Feiring*, 313 U.S. at 285, but also a uniform system for unemployment compensation. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981). The Court should step in to resolve this confusion by providing the lower courts with much-needed guidance.

III. Reimbursement Payments By Non-Profit Employers Of Unemployment Compensation Benefits Are Excise Taxes Within The Meaning Of The Bankruptcy Code.

The Third Circuit's decision in the present case cannot be reconciled with this Court's view of what constitutes a tax for the purposes of bankruptcy. In *Anderson* and *Feiring*, this Court held that for the purposes of bankruptcy a tax is a "pecuniary burden" imposed on an individual or entity without their consent in order to support the government or programs authorized by the government. *Anderson*, 203 U.S. at 492; *Feiring*, 313 U.S. at 285. The Court reaffirmed the principles underlying those decisions in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 222 (1996) (referring to "continuing vitality of the cases in the *Feiring* line"). Under a straightforward application of the *Anderson-Feiring* standard, the UC reimbursements owed to New Jersey are a tax, entitled to priority under Sections 507(a)(1) and (8) of the Bankruptcy Code, 11 U.S.C. §507(a)(1) and (8). The reimbursements are involuntary payments required by the legislature in order to support New Jersey's UC system. The conclusion of the Third Circuit majority that these payments are "voluntary" and are

part of an implied contract with the State is simply untenable.

In deciding this case, the Third Circuit failed to adhere to this Court's standard — or, indeed, to any discernible standard — in an effort not to fail to "consider the characteristics of the obligation in light of the evolving treatment of priority claims under the Bankruptcy Code." *United Healthcare*, 396 F.3d at 256. In fact, the Third Circuit goes farther than the Sixth or the First Circuit by adopting a "functional examination that balances the characteristics of the obligation" and which is "flexible enough to allow for consideration of any relevant factor." *Id.* 396 F.3d at 255. Although the Third Circuit recognized that Congress had not rejected the *Anderson-Feiring* line of cases in enacting the 1978 Bankruptcy Code, it provided no explanation for adopting a completely open-ended approach which sets no limits and provides little guidance on how it should be applied by the lower courts.

Finally, the Third Circuit's decision encourages non-profits to default on their obligations, and unfairly requires for-profit employers and employees to subsidize non-profits through lower benefits and increased contributions. This cannot be what Congress intended in enacting either FUTA or the Bankruptcy Code.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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No. 04-1487

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State of New Jersey, Department of Labor,
Petitioner,

v.

The Reconstituted Committee of Unsecured Creditors of the United Healthcare System, Inc.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals For the Third Circuit

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REPLY BRIEF OF THE PETITIONER

As of 1970, the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §3301, *et seq.*, allowed the States to impose an obligation on non-profit employers to pay state-level Unemployment Compensation ("UC") taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 397, n.6 (1982) (citing *Pub. L.* 91-373, §104(b)(1)). However, FUTA also mandates that, in imposing this involuntary exaction, the States must allow non-profit employers the option of paying the UC taxes in advance, or reimburse the State for unemployment benefits that the State pays to former employees of the organization. 26 U.S.C. §§ 3306(c)(8), 3309(a).

As demonstrated by the Petitioner ("the State") in the certiorari petition, the decision of the Third Circuit has recast the FUTA mandated alternative method of collection of tax

obligations, into a contract between the State and electing non-profit employers. Clearly, its analysis and holding did not result from a straight forward application of this Court's test as to "what is a tax" but rather, evinces a view that courts must invent more searching tests to satisfy the goals of the bankruptcy system.

I. THE INVOLUNTARY EXACTIONS IMPOSED UPON NON-PROFIT EMPLOYERS, COLLECTIBLE AS REIMBURSEMENTS, MEET THIS COURT'S TESTS FOR WHAT IS A TAX

This Court has expressly and explicitly set forth a broad standard for determining whether an exaction is a tax. *See, State of New Jersey v. Anderson*, 203 U.S. 483 (1906) and *City of New York v. Feiring*, 313 U.S. 283 (1941). The standard was reaffirmed in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (stating that "[a] tax is an enforced contribution to provide for the support of government," contrasting it with a penalty which is "imposed by statute as punishment for an unlawful act").

A straight-forward application of this test leaves no room for doubt that a non-profit employer's involuntary obligation to pay its share of unemployment taxes, collected by the State in the form of reimbursements, is a tax. The employer's obligation to reimburse is mandatory, imposed upon it by statute, and is a method of satisfying its duty to fund the unemployment compensation benefits for its laid-off employees. The State statute explicitly declares that unemployment compensation benefits are provided for the public good. N.J.S.A. 43:21-2. Courts have also universally agreed that the unemployment compensation system is an appropriate governmental purpose, undertaken for the common welfare of its citizens. As such, the exactions here, are plainly a tax.

Respondent maintains that the Third Circuit in this case, faithfully applied this Court's standard in *CF&I*, *supra*,

conducted a "functional analysis" and concluded that the obligations did not qualify as a tax because the obligations did not raise funds to "support a general governmental undertaking." Opp. Brf. at pp. 13-18. However, the Third Circuit did not execute a simple and straight forward application of this Court's tests. Rather, it engaged in a far more searching analysis and review to determine whether this payment was a tax, or some sort of contractual debt. This was evidently because, as the Third Circuit noted, the scope of priority for "government obligations" had changed considerably from the Bankruptcy Act to its replacement by the Bankruptcy Code. *See*, Pet. App. 9, 14.[1]

In addition the Third Circuit had to resort to relying upon cases such as *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), to bolster its conclusion that the involuntary reimbursement obligation of the employer to make payments to the UC Fund resulted from a contractual relation between the State and the employer, and was thus an ordinary debt, akin to a fee. *See*, Pet. App. 23.

In this connection, Respondent erroneously asserts that the State "concedes ... that the Reimbursement Obligation did not contribute to the administrative costs or the solvency of" the State's "unemployment compensation system." Opp. Brf. at p.17, n.8; p.21 (referencing the State's Petition at p.4). The State made no such concession.

Rather, in explicating that the reimbursement amount sought from the electing non-profit employer comprises the actual unemployment compensation benefits paid to the laid off employees, and does not include costs or assessments, the State asserted that the reimbursements represent amounts *exclusive* of other costs and assessments. Such costs and assessments are *independently* imposed on these employers under N.J.S.A.

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[1] "Pet. App." refers to the State's Appendix filed with its Petition for Writ of Certiorari.

43:21-7(e) and N.J.S.A. 43:21-48. In fact, the State expressly asserted that its statute imposes costs and assessments on all employers including non-profits. *See*, Petition at p.25 (relying on N.J.S.A. 43:21-48, Pet. App. 95-96).[2]

II. COURTS ARE SPLIT IN DECIDING THE FUNDAMENTAL AND PRIMARY ISSUE, NAMELY, "WHAT IS A TAX"

Every case involving the analysis of 11 U.S.C. § 507(a)(8) requires preliminary determination of a fundamental issue, namely, whether an exaction by a governmental unit is a tax. Nowhere in its opposition does the Respondent disagree with this precept.[3]

However, "lower courts have . . . struggled in applying the *Feiring-Anderson* analysis" in bankruptcy cases. *Boston Reg'l Med. Ctr., Inc. v. Massachusetts Div. of Health Care Finance and Policy*, 365 F.3d 51, 58 (1st Cir. 2004) (*"Boston Reg'l II"*). Thus, they have weighed the "tax characteristics of a state-imposed exaction" with its "non-tax characteristics;" analyzed the "tax attributes" of the exaction; or focused upon the "the Bankruptcy Code's principle of equal distribution of the debtor's estate." *Ibid.* This has resulted in conflicting decisions due to the application of widely divergent standards.

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[2] This is also why the State's proofs of claim filed in the debtor's bankruptcy included, *in addition to the reimbursement amounts*, amounts for unpaid employer/employee State disability contributions and annual assessments imposed on the employer. Petition at 5, n.3.

[3] Respondent's emphasis of the Bankruptcy Court's denial of an administrative status to the State's claim, and alternative priority status under 11 *U.S.C.* §507(a)(8)(D), Opp. Brf. at pp. 3-5, is irrelevant to the issues presented here since they were not the subject of appeal at any appellate stage. Respondent fails to mentions that the State's administrative claim was reclassified as a priority claim for approximately $9 million. Thus, Respondent's futile attempt to deflect attention from its losses in the lower courts, is unavailing.

Respondent claims there is no conflict because both the First Circuit in *In re Boston Reg'l Med. Ctr., Inc.*, 291 F.3d 111, 121-122 (1st Cir. 2002) ("*Boston Reg'l I*") and Third Circuit in this case undertook a functional analysis of the exaction and concluded that the reimbursement obligations of non-profit employers to the State was not a tax. Opp. Brf. at pp. 9-10. However, Respondent fails to acknowledge that the Third Circuit expressly disagreed with the First Circuit's "functional analysis" and specifically rejected the First Circuit's conclusion that the availability of a surety bond in favor of the State weighed against granting the reimbursement obligation a tax status. Pet. App. 19-20.

Similarly, while the First Circuit found it extremely persuasive that the non-profit employers were not imposed costs and assessments in relation to the Commonwealth's UC fund, *Boston Reg'l, I, supra,* 291 F.3d at 121-22, the Third Circuit did not even consider the role of costs and assessments imposed by New Jersey on electing non-profit employers.[4]

Respondent's conclusion that there is no conflict because the "holding" of these two Circuits are the same (reimbursements owed to the State under the UC laws are not taxes), regardless of the reasoning or analysis, Opp. Brf. at 7-8, n.5, is superficially simplistic and patently erroneous. When the test of what constitutes a tax is being applied unevenly and inconsistently by the Circuits and the lower courts, such that even decisions that reach the same result, "unfortunately lack[] consistency," *In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 340 (6th Cir. 1993) ("*Suburban I*"), there is no question that disparate application of this Court's standards has resulted in inconsistent rulings as to the basic issue and premise of a court's holding, namely, "what is a tax," thereby causing an unresolved conflict.

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[4] Indeed, it could not have given that the New Jersey statutes impose costs and assessments on all employers including non-profits, N.J.S.A. 43:21-48 (Pet. App. 95-96).

Respondent ignores the fact that circuit courts agree that the issue of whether a reimbursement is a tax has been decided with varying and conflicting results, with some courts applying the *Anderson-Feiring* test (as explicated in *County Sanitation v. Lorber Indus. of California, Inc.*, 675 F.2d 1062, 1066 (9th Cir. 1982) *"Lorber"*), and some courts preferring to give "particular and separate weight to the Bankruptcy Code's principle of equal distribution of the debtor's estate." *See, Boston Reg'l II*, 365 F.3d at 58; *New Neighborhoods, Inc. v. West Va. Workers Comp. Ins. Fund*, 886 F.2d 714, 717-19 (4th Cir. 1989) (courts approach the issue of whether an exaction is an excise tax in three ways, one set of courts apply the "broad coverage definition" of a tax; the second approach examines the state statute and weighs the tax versus non-tax attributes of the statutory scheme; and the third approach is to deem an exaction a tax, if the exaction had sufficient tax attributes regardless of other attributes).

In fact, Respondent concedes the existence of the widely differing standards when it endorses these bankruptcy-motivated modifications, and actually adds another limitation to this Court's test of "what is a tax" by maintaining that this issue should be controlled by the "important Federal policy" of the Bankruptcy Code, namely, that "priorities in bankruptcy ... be narrowly construed." Opp. Brf. at p.20. It is precisely these carved out exceptions that obliterate the priority scheme of the Bankruptcy Code, and undermine this Court's test.

Respondent's dismissal of the State's reliance on cases involving state Workers Compensation (WC) programs; "charity care" laws (*Boston Reg'l II*) and "sewer use statutes" (*Lorber*) as establishing a conflict fares no better.[5] All the

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[5] Notably, the Respondent relied upon these cases in support of its contentions that the reimbursements are not a tax. *See*, App. 1-12. *See, also*, Opp. Brf. at p.19-20. Evidently, the Respondent's assertion, now, that these cases are under "separate statutes" and therefore, irrelevant, is a futile effort to establish lack of conflict and prevent this Court from granting certiorari.

cases involving WC liabilities exacted as reimbursements have been utilized by the courts in determining the primary issue, namely, whether an exaction is a tax (and an excise tax) in the realm of unemployment taxes (payable as contributions/reimbursements). The analogy in both instances is the same because courts necessarily examine whether the exaction is a tax in either context. *See, e.g., Boston Reg'l, I*, 291 F.3d at 121-122 (setting out the "various cases that have determined to assign priority to unemployment insurance contributions and to similar obligations" and agreeing that "[w]ithin the framework established by precedent" the reimbursements due under the State's UC laws could arguable be "called taxes."); *In re Cottage Grove Hosp.*, 265 B.R. 241, 246 (Bankr. D. Or. 2001) ("the requirement imposed upon employers, under Oregon law, to make percentage payments or reimbursement payments to the [UC] Fund is analogous to the requirements imposed upon employers to make payments" under the State's worker's compensation laws); *In re Pan American Paper Mills*, 618 F.2d 159 (1st Cir. 1980) (worker's compensation premiums, like unemployment insurance premiums, should be treated as taxes because they were both pecuniary obligations imposed by the government for defraying the expenses of an authorized undertaking); *Sacred Heart Hospital of Norristown v. Pennsylvania Dept. of Labor & Indus.*, 209 B.R. 650 (E.D. Pa. 1997).

Even in the "charity care statute" at issue in *Boston Reg'l II, supra*, the First Circuit analyzed these very WC cases, and the "sewer use" case (*Lorber*), to conclude that the exactions were a tax, *Boston Reg'l II*, 365 F.3d at 65. In doing so, the court explicitly pointed out to the conflicting opinions due to the "struggle[] in applying the *Feiring-Anderson* analysis to debts in a bankruptcy setting." *Boston Reg'l II*, 365 F.3d at 58.

III. THE QUESTION PRESENTED IN THE CERTIORARI PETITION WARRANTS REVIEW

This case presents a first-impression, significant federal question for this Court. This is, whether the Third Circuit's

decision destroys the taxing power of the States, which have been congressionally granted the right to tax non-profit employers for unemployment taxes to fund the State's UC fund, but are required to collect that tax either as a contribution or as a reimbursement in lieu. This issue significantly affects and impacts all fifty states.[6]

Respondent claims this case presents nothing new or significant because this Court has already stated the tests for determining "what is a tax." Opp. Brf. at p.19-20.[7] But it is precisely because the courts are split on applying this Court's test, and have engrafted the test with their own limitations, such that the exceptions are threatening to swallow the rule, that this case presents a significant unresolved federal question.

Respondent misses the point by arguing that the Third Circuit's decision accords with the scheme of FUTA. Opp. Brf. at p.20. The issue is not that FUTA requires the States to allow non-profit employers an alternative method of paying their UC obligations. The issue is whether the obligations imposed by the State under the UC laws, collected as reimbursements, are a tax. The Third Circuit has stated that the FUTA is silent on this, Pet. App. 23, as did the Bankruptcy Court. Pet. App. 51.

Respondent's attempts to minimize the significance of the issue presented here by contending that it is a one-of-a-kind case, with almost no precedential value, Opp. Brf. at p.21, is off the mark. The Respondent has done nothing to conclusively prove its speculated assertions, namely, that there are few to none non-profit employers, that these employers rarely if ever

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[6] Twenty-three States have joined on a brief in support of the State's petition for writ of certiorari, as *amici curiae*.

[7] The Third Circuit conceded that this is a "close" and "difficult" case. Pet. App. 19 (majority); Pet. App. 24 (Chief Judge Scirica, dissenting). Respondent's attempt to minimize the importance of this case, and the need for a resolution by this Court, thus, strikes as extremely hollow.